No. 02–1624

Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS

v.

MICHAEL A. NEWDOW, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

GERALDINE R. GENNET
General Counsel
Counsel of Record
KERRY W. KIRCHER
Deputy General Counsel
MICHAEL L. STERN
Senior Counsel
DAVID PLOTINSKY
Assistant Counsel
CHRISTINE M. DAVENPORT
Assistant Counsel
JOHN D. FILAMOR
Assistant Counsel

Office of General Counsel
United States House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225–9700

DECEMBER 19, 2003

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The History of the Pledge Demonstrates That the Inclusion of the Words "Under God" Does Not Render the Pledge an Expression of Religion	5
II. The Ninth Circuit's Establishment Clause Analysis Is Flawed Because It Mischaracterizes the Pledge as a Religious, Rather Than a Patriotic, Statement	9
III. The Ninth Circuit's Judgment Conflicts With Previous Pronouncements by This Court That the Pledge of Allegiance Is Constitutional	11
CONCLUSION	14

Page

TABLE OF AUTHORITIES

Cases

Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989) 2
County of Allegheny v. ACLU, 492 U.S. 573 (1989) 12
Engel v. Vitale, 370 U.S. 421 (1962) 12
Lee v. Weisman, 505 U.S. 577 (1992)..... 4, 9, 10, 12
Lynch v. Donnelly, 465 U.S. 668 (1984) 11
Morrison v. Olson, 487 U.S. 654 (1988) 2
Newdow v. Congress of the United States, No. S–01–1924 (E.D. Cal. Aug. 8, 2002) 4
Newdow v. Eagen, No. 1:02CV01704 (D.D.C. filed Aug. 27, 2002) 4
Newdow v. United States, No. 98–6585 (S.D. Fla. Dec. 1, 1998), aff'd, 207 F.3d 662 (Table) (11th Cir. 2000) 4
Raines v. Byrd, 521 U.S. 811 (1997) 2
School Dist. of Abington Township. v. Schempp, 374 U.S. 203 (1963) 13
United States v. Eichman, 496 U.S. 310 (1990) 2

Constitution and Statutes

U.S. CONST. art. 1, §6, cl. 1 2
U.S. CONST. amend. I..... *passim*
Pub. L. No. 623, Ch. 435, §7, 56 Stat. 380 (1942) 6
Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) 6
Pub. L. No. 107–293, §2(b), 116 Stat. 2057 (2002) 8

Rules

Rule XIV.1, Rules of the U.S. House of Representatives (108th Cong.) 2

Legislative Materials

100 CONG. REC. 7761 (1954) (statement of Rep. Keating). 6
100 CONG. REC. 7764 (1954) (statement of Rep. Rodino) 6
100 CONG. REC. 7765 (1954) (statement of Rep. Laird) 7
148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Kleczka) 2

Page

Legislative Materials—Continued

148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Shays)..... 2, 7–8
H. REP. NO. 83–1693 (1954) 8
H. Res. 459, 107th Cong., 148 CONG. REC. H4125 (daily ed. June 27, 2002) (enacted) 3, 7
H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted) 3, 8
H. Res. 132, 108th Cong., 149 CONG. REC. H1977 (daily ed. March 20, 2003) (enacted) 9
S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (daily ed. June 26, 2002) (enacted) 7
S. Res. 71, 108th Cong., 149 CONG. REC. S3076 (daily ed. March 4, 2003) 9

Miscellaneous

John W. Baer, *The Pledge of Allegiance: A Centennial History 1892–1992* (1992) 5
App. to Pet. for Cert 2, 10, 11

No. 02–1624

In the Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS

v.

MICHAEL A. NEWDOW, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE [1]

The Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully submits this brief as amicus curiae supporting the petitioner, urging reversal of the Ninth Circuit's judgment in this case.[2] The Bipartisan Legal Advisory Group represents the institutional interests of the House in judicial proceedings, and it and

[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus curiae and its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] The Bipartisan Legal Advisory Group consists of Speaker of the House J. Dennis Hastert, Majority Leader Tom DeLay, Majority Whip Roy Blunt, Minority Leader Nancy Pelosi and Minority Whip Steny H. Hoyer.

its predecessors have often appeared before this Court where such institutional interests were at stake.[3]

When this case was initially filed, Congress (but not the House and Senate individually) was named as a defendant. The Ninth Circuit held that Congress was not a proper defendant because "in light of the Speech or Debate Clause of the Constitution, Art. I, §6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation." App. to Pet. for Cert. at 6. However, even though Congress was not a proper defendant, it clearly is appropriate for the House, through its Bipartisan Legal Advisory Group, to appear as amicus curiae before this Court because of the House's strong interest in this case.

The House's interest in this case stems from the unique and vital place of the Pledge of Allegiance in the civic life of this Nation. "The Pledge of Allegiance is a revered expression of patriotism recited by millions of citizens every day. When it is spoken, it instills support for the United States and reflects the love that Americans feel for their country." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Kleczka). Indeed, it is almost impossible to overstate the Pledge's importance to the American people for whom it "is not a prayer [or] part of a religious service . . . [but rather] a statement of our commitment as citizens to our great Nation." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Shays). The House has recognized the significance and vitality of the Pledge by providing for its recitation near the beginning of each session of the House. *See* Rule XIV.1, Rules of the U.S. House of Representatives (108th Cong.) (third item in "daily order of business" is the "Pledge of Allegiance to the Flag"). More recently, the House adopted, by overwhelming bipartisan majorities, two resolutions condemning the decision below and expressing support for the Pledge as written. *See* H. Res. 459, 107th Cong., 148 CONG. REC. H4125 (daily ed. June 27, 2002) (enacted); H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted). In so doing, the House was clearly giving voice to the sentiments of an overwhelming number of Americans.

[3] *See, e.g., Raines v. Byrd,* 521 U.S. 811, 818 n.2 (1997); *United States v. Eichman,* 496 U.S. 310, 311 (1990); *Am. Foreign Serv. Ass'n v. Garfinkel,* 490 U.S. 153, 154 (1989); *Morrison v. Olson,* 487 U.S. 654, 659 (1988).

For these reasons, it is appropriate for the House, both because of its own institutional interests and as the elective body that most directly represents the views of the people of this nation, to appear in this case as amicus curiae in support of the petitioner.

SUMMARY OF ARGUMENT

In order to examine the constitutionality of the Elk Grove Unified School District policy, it is necessary to examine the Pledge of Allegiance itself. The Ninth Circuit's judgment should be reversed because the Pledge presents no Establishment Clause violation. First, the history of the Pledge demonstrates that the inclusion of the words "under God" does not render the Pledge an expression of religion. Second, the Ninth Circuit's Establishment Clause analysis is flawed because it mischaracterizes the Pledge as a religious statement rather than a patriotic statement. Third, the Ninth Circuit's judgment conflicts with previous pronouncements by this Court that the Pledge is constitutional.

When the words "under God" were added to the Pledge in 1954, Congress believed it vital that the Pledge reflect a distinction between the United States and the communist Soviet Union. In the attempt to distinguish between the two countries, the legislators focused on the fact that the founders of this nation were theists, whereas the founders of the Soviet Union were nontheists. In doing so, the legislators were acutely aware of the place of the words "under God" in our history, specifically the inclusion of those words in Abraham Lincoln's Gettysburg Address. The Pledge was thus amended to reflect the reli-

gious heritage, foundation and character of the United States—not to promote any sort of religious doctrine.

In finding that the Pledge fails the coercion test, the Ninth Circuit relied on the mistaken assumption that the Pledge is a religious statement, when in fact the Pledge is a patriotic statement. The historical reference to a nation founded "under God" does not change that fact.

Finally, the Ninth Circuit's judgment conflicts with relevant decisions of this Court. This Court's case law makes it very clear that the Establishment Clause does not prohibit official government expression of the religious heritage, foundation and character of the United States. While the Court has never ruled explicitly on the Pledge itself, the Court has repeatedly cited the Pledge as an example of the type of expression that is permissible under Establishment Clause jurisprudence.

ARGUMENT

"A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman,* 505 U.S. 577, 598 (1992). These are the words of the Supreme Court, and they aptly describe this case.[4]

At issue in this case is a policy of the Elk Grove Unified School District requiring teachers to lead willing students in reciting the Pledge of Allegiance. The Ninth Circuit ruled that the inclusion of the words "under God" in the

[4] We note that this case is not an isolated piece of litigation, but rather is part of an all-out effort by the respondent to eliminate any reference to "God" in our public life. In recent years, he has named Congress as a defendant in three other lawsuits, the first of which challenged references to God in the Pledge and the National Motto, and on U.S. currency; the second of which challenged references to God in congressional resolutions; and the third of which challenges the existence of congressional chaplains. The first two cases have been dismissed, *Newdow v. United States*, No. 98–6585 (S.D. Fla. Dec. 1, 1998), *aff'd,* 207 F.3d 662 (Table) (11th Cir. 2000); *Newdow v. Congress of the United States*, No. S–01–1924 (E.D. Cal. Aug. 8, 2002), while the third is still pending. *Newdow v. Eagen*, No. 1:02CV01704 (D.D.C. filed Aug. 27, 2002).

Pledge causes the Elk Grove policy to violate the Establishment Clause of the First Amendment.

Far from violating the Establishment Clause, the Pledge of Allegiance actually serves as an example of precisely the sort of expression that is constitutional. The history and nature of the Pledge, as well as this Court's case law, indicate that the Pledge is on sound constitutional footing. If the Court were now to change course and strike down the Elk Grove Unified School District policy, the ramifications would be grave indeed. It is no exaggeration to say that such a decision by the Court would so radically alter this nation's Establishment Clause jurisprudence as to require a sweeping reevaluation of numerous practices and policies that have heretofore been deemed constitutional.

For all the reasons set forth below, the Ninth Circuit's judgment should be reversed.

I. The History of the Pledge Demonstrates That the Inclusion of the Words "Under God" Does Not Render the Pledge an Expression of Religion

In determining whether the Elk Grove Unified School District policy is constitutional, it is necessary to examine the Pledge itself, and this examination must begin with an understanding of the background and history of the Pledge. The initial version of the Pledge was composed for an 1892 national public school Columbus Day celebration of the 400th anniversary of the discovery of America. John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892–1992*, 2 (1992). The author, Francis Bellamy, offered the following account of how and why he arrived at the phrase "One Nation, indivisible":

> Now how should the vista be widened so as to teach the national fundamentals? I laid down my pencil and tried to pass our history in review. It took in the sayings of Washington, the arguments on Hamilton, the Webster-Hayne debate, the speeches of Seward and Lincoln, the Civil War. After many attempts all that pictured

> struggle reduced itself to three words, "One Nation, indivisible." To reach that compact brevity, conveying the facts of a single nationality and of an indivisibility both of States and of common interest, was, as I recall, the most arduous phase of the task, and the discarded experiments at phrasing overflowed the scrap basket.

100 CONG. REC. 7761 (1954) (statement of Rep. Keating, quoting "A brief synopsis of the story of the origin of the pledge taken from the detailed narrative by Francis Bellamy, author of the pledge").

The Pledge underwent a number of alterations until it was officially codified by Congress in June of 1942, in the darkest hours of the Second World War. Pub. L. No. 623, Ch. 435, §7, 56 Stat. 380 (1942). Twelve years later, again at a critical juncture in our nation's history—this time at the height of the Cold War, amid the tensions and uncertainty created by Stalin's death a year earlier—Congress amended the Pledge by adding the words "under God." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954).

The 1954 Congress believed it vital that the Pledge reflect a distinction between the United States and the communist Soviet Union. In the attempt to distinguish between the two countries, the legislators focused on the fact that our nation was founded by theists whose religious belief influenced their thinking, in contrast to the Soviet Union.

At the same time, in adding the words "under God" to the Pledge the legislators were acutely aware of the place of those two words in our history. "These two words are . . . taken from the Gettysburg Address, and represent the characteristic feeling of Abraham Lincoln, who towers today in our imaginations as typical of all that is best in America." 100 CONG. REC. 7764 (1954) (statement of Rep. Rodino). Another Member of Congress said:

> I pointed out that this year our country celebrated the 145th anniversary of the birth of Abraham Lincoln. President Lincoln recognized

> that only under God could this Nation win a new birth of freedom. I would like to quote the last sentence from President Lincoln's Gettysburg Address: "It is rather for us to be dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this *Nation, under God*, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

100 CONG. REC. 7765 (1954) (statement of Rep. Laird) (emphasis added).

More recent history reflects the continuing recognition that the Pledge is not a religious expression. The day after the initial Ninth Circuit judgment was issued, the House adopted a resolution, by a vote of 416 to three, affirming that "the Pledge of Allegiance and similar expressions are not unconstitutional expressions of religious belief." H. Res. 459, 107th Cong., 148 CONG. REC. H4125 (daily ed. June 27, 2002) (enacted). The resolution also urged the Ninth Circuit to "rehear this ruling en banc in order to reverse this constitutionally infirm and historically incorrect ruling." *Id.*[5]

In so doing, the House acknowledged the historical fact that religion has played an undeniable role in the founding and development of the nation. "As a new nation we claimed our freedom from any monarch in the Declaration of Independence and inherently in the U.S. Constitution because of 'certain [inalienable] rights' guaranteed to us by our Creator." 148 CONG. REC. H4132 (daily ed. June 27, 2002) (statement of Rep. Shays). "President

[5] The Senate also adopted, by a vote of 99 to zero, a resolution "strongly disapprov[ing]" of the Ninth Circuit decision. S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (daily ed. June 26, 2002) (enacted).

Abraham Lincoln, in his second inaugural address, spoke of God thirteen times, not in an effort to unite church and state but to unite our Nation at the conclusion of one of the most devastating periods in U.S. history, the War Between the States." *Id.*[6]

On November 13, 2002, Congress acted again to express the nation's support for the Pledge. By votes of 401 to five in the House and 99 to zero in the Senate, Congress reenacted the Pledge of Allegiance—including the words "under God"—into law. The statute directs that "[i]n codifying this subsection, the Office of Law Revision Counsel shall show in the historical and statutory notes that the 107th Congress reaffirmed the exact language that has appeared in the Pledge for decades." Pub. L. No. 107–293, § 2(b), 116 Stat. 2057 (2002).

Finally, after the Ninth Circuit rejected the petitions for rehearing, the House adopted another resolution, by a vote of 400 to seven, again stating its position that the decision of the Ninth Circuit was erroneous and that the recitation of the Pledge of Allegiance is a "patriotic" act rather than a religious one. H. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. March 20, 2003) (enacted). The House resolution went on to urge this Court "to correct this constitutionally infirm and historically incorrect holding." *Id.* at H1977.[7]

[6] The 1954 Congress explicitly considered the Establishment Clause in its debate on the amendment, and the legislators openly looked to the Supreme Court for guidance.

> The Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (*Zorach v. Clauson* (343 U.S. 306, 312–313)[(1952)]). In so construing the first amendment, the Court pointed out that, if this recognition of the Almighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, "God save the United States and this Honorable Court" (*id.*, 313).

H. REP. NO. 83–1693, at 3 (1954).

There are undoubtedly many individuals who wish religion had played no part in the founding and history of this nation. The reality, however, is that religion has influenced this country's development, and this historical fact is reflected in various public rituals, symbols and expressions. The history of the Pledge, from its inception through the present day, demonstrates that the Pledge is not an expression of religious belief. Rather, the Pledge is a patriotic expression that reflects the religious heritage, foundation and character of the United States. As discussed in Sections II and III, *infra,* the Pledge of Allegiance is one such patriotic expression, and as such is eminently constitutional.

II. The Ninth Circuit's Establishment Clause Analysis Is Flawed Because It Mischaracterizes the Pledge as a Religious, Rather Than a Patriotic, Statement

One of the tests this Court has articulated to evaluate whether challenged government conduct violates the Establishment Clause is the "coercion test." The Ninth Circuit's judgment applied this test, and concluded that the Elk Grove Unified School District policy failed. This conclusion is erroneous, and appears to stem from a fundamental mischaracterization of the Pledge as a religious, rather than a patriotic, statement.

The "coercion" test is based on the principle that the government "may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." *Lee v. Weisman,* 505 U.S. 577, 587 (1992) (internal citations and quotation marks omitted). In *Lee,* the Court examined the practice of having nonsectarian prayers at public school graduations. The Court

[7] The Senate also adopted a resolution, by a vote of 94 to zero, "strongly disapprov[ing] of" the decision. S. Res. 71, 108th Cong., 149 CONG. REC. S3076 (daily ed. March 4, 2003).

held that such prayers were unconstitutional because the school district's supervision and control of the ceremony put impermissible pressure on students to participate in, or at least show respect during, the prayer. *Id.* at 593. The Ninth Circuit's judgment in this case concluded that the Elk Grove policy failed the coercion test because, as in *Lee*, the policy placed students "in the untenable position of choosing between participating in an exercise with religious content or protesting." App. at 13.

The Ninth Circuit's judgment might very well be correct if its underlying assumption were correct that the Pledge of Allegiance is fundamentally a religious expression. This assumption, however, is not at all correct. The Pledge does not itself promote a belief in God. Rather, as discussed in Section I, *supra*, the Pledge reflects the historical fact that the United States was founded by individuals who were profoundly and undeniably influenced by their faith in God.

The structure of the Pledge itself supports this view, and undercuts the assertion of the Ninth Circuit's judgment that schoolchildren are coerced into reciting a "profession of a religious belief, namely, a belief in monotheism." App. at 11–12. The text of the Pledge is as follows: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." The structure of the Pledge exhibits two main components. The first is a list of things to which allegiance is pledged, and the second is a description of the nation. In the first component of the Pledge, two specific things are listed to which allegiance is pledged: (1) the flag of the United States of America; and (2) the Republic for which it stands. Notably absent is a pledge of allegiance to God. The reference to God comes in the second part of the Pledge—the part describing the nation as: (1) founded under God; (2) indivisible; and (3) committed to liberty and justice for all. This second component of the Pledge, including the reference to God, is not an expression of religious belief but rather a description of various deep-

rooted and historical characteristics of this nation, as perceived by its people.

The Ninth Circuit's characterization of the Pledge as "an exercise with religious content," App. at 13, is also wrong because it looks at two words of the Pledge in isolation and ignores the Pledge as a whole. In *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984), this Court stated: "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." The Ninth Circuit's judgment falls precisely into the trap against which *Lynch* warns—focusing exclusively on two words, and ignoring those words' place in the context of the Pledge as a whole.

III. The Ninth Circuit's Judgment Conflicts With Previous Pronouncements by This Court That the Pledge of Allegiance Is Constitutional

While this Court has never ruled explicitly on the Pledge itself, it has repeatedly cited the Pledge as an example of the type of expression that is permissible under Establishment Clause jurisprudence. In this respect, the Ninth Circuit's judgment departs drastically from prior pronouncements by this Court.

In *Lynch*, this Court stated that acceptable "examples of reference to our religious heritage are found . . . in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which "is recited by thousands of public school children—and adults—every year." *Lynch*, 465 U.S. at 676. The fact that *Lynch* uses the Pledge as an example of precisely the type of reference to the nation's religious heritage that does not "establish[] a religion or religious faith," *id.* at 678, highlights the inconsistency of the Ninth Circuit's judgment with opinions of this Court.

Similarly, in a case involving the constitutionality of a publicly-displayed creche and menorah, this Court used the Pledge as an example of what the Establishment Clause permits. In that case, the Court ruled that the public display of a creche violated the Establishment

Clause. *County of Allegheny v. ACLU*, 492 U.S. 573, 602–03 (1989). In doing so, however, the Court expressly distinguished the display of the creche from the Pledge of Allegiance: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. . . . [T]here is an obvious distinction between creche displays and references to God in the motto and the pledge." *Id.* at 602–03 (internal citations omitted).

It is also significant that this Court has addressed several cases in which school exercises contained both religious components and the Pledge of Allegiance. In these cases, the Court struck down the religious components but left the Pledge untouched. In *Lee v. Weisman*, one of the cases cited in the Ninth Circuit's decision, the Court described a challenged graduation ceremony in this way: "There the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers." 505 U.S. 577, 583 (1992). The Court ruled that the school in question was persuading or compelling students to participate in a prayer, and was thus in violation of the Establishment Clause. *Id.* at 599. The Court, which was obviously quite aware that the Pledge immediately preceded the prayer at the graduation, conspicuously did nothing to suggest the Pledge was a problem of any sort.

In *Engel v. Vitale*, the Court addressed a school prayer case involving the following facts: "The prayer is said upon the commencement of the school day, immediately following the pledge of allegiance to the flag." 370 U.S. 421, 438 (1962) (Douglas, J., concurring). The Court ruled that the state law prescribing the prayer violated the Establishment Clause. *Id.* at 433. The Court also took pains, however, to clarify that "nothing in the decision reached here [] is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity." *Id.* at 435 n.21. Again, the Court conspicuously left the Pledge in place, even though it was obviously aware that the Pledge immediately preceded the prayer.

In *School District of Abington Township v. Schempp*, this Court addressed yet another similar situation: "[T]he Bible reading and the recitation of the Lord's Prayer were conducted by the home-room teacher, who chose the text of the verses and read them herself or had students read them in rotation or by volunteers. This was followed by a standing recitation of the Lord's Prayer, together with the Pledge of Allegiance to the Flag by the class in unison." 374 U.S. 203, 208 (1963). The Court in that case ruled that the Bible reading and recitation of the Lord's Prayer were violations of the Establishment Clause. *Id.* at 224. Again, the Court's failure to simultaneously strike down the Pledge is conspicuous and telling.

This Court's case law makes it very clear that the Establishment Clause does not prohibit official government expression of the religious heritage, foundation and character of the United States, and that the Pledge of Allegiance is an example of the sort of expression that is constitutional. In this way, the Ninth Circuit's judgment squarely conflicts with this Court's own pronouncements.

CONCLUSION

For the reasons set forth herein, the Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully urges that the Court reverse the judgment of the Ninth Circuit in this case.

Respectfully submitted,

GERALDINE R. GENNET
General Counsel
Counsel of Record
KERRY W. KIRCHER
Deputy General Counsel
MICHAEL L. STERN
Senior Counsel
DAVID PLOTINSKY
Assistant Counsel
CHRISTINE M. DAVENPORT
Assistant Counsel
JOHN D. FILAMOR
Assistant Counsel

Office of General Counsel
United States House of
Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225–9700

Counsel for Amicus Curiae

December 19, 2003

○